Tentative Rulings for October 31, 2012
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

10CECG02505 ***Humphrey v. PVSP Medical Department*** **(Dept. 402)**

10CECG00854 ***Garcia v. Natera*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

(20) **Tentative Ruling**

Re: ***Switzer v. Flournoy Management, LLC, et al.***, Superior Court Case No. 11CECG04395

Hearing Date: **October 31, 2012 (Dept. 402)**

Motion: Motions to Compel Further Responses to Form Interrogatories and Requests for Admissions

Tentative Ruling:

To grant the motions to compel further responses to Request for Admission nos. 5, 6, 8 and 9, and Form Interrogatory nos. 15.1 and 17.1 (as to Request for Admission nos. 4 and 10 only). Code Civ. Proc. §§ 2030.300(d), 2033.290(d). Defendant Sonny Wood shall serve the verifications of the previously served responses to the Requests for Admission and the Form Interrogatories, and amended verified responses to the above requests, within 10 days of service of the order by the clerk.

To impose $1,632.50 in monetary sanctions against Robert Woods and in favor of Ted Switzer, to be paid within 30 days of service of the order by the clerk. Code Civ. Proc. §§ 2030.300(d), 2033.290(d), 2023.030.

Explanation:

First, both motions must be granted because the responses were served without verifications. Responses must be signed under oath. Code Civ. Proc. §§ 2030.250(a), 2033.240(a). Unverified responses are tantamount to no responses at all. *Steven M. Garber & Assoc. v. Eskandarian* (2007) 150 Cal.App.4th 813, 817 fn. 4.

The responses to RFA nos. 5, 6, 8 and 9 are evasive and raise meritless objections.

Wood is asked to admit that, in response to Switzer's 9/30/11 written request to provide him copies of any writings relating to Flournoy Management, Wood refused to provide the copies (RFA no. 5), and Wood had no justification to completely refuse the request (RFA no. 6).

In response to RFA no. 5, Wood responded that he "did not provide any additional documents pursuant to the request," and denied "the remainder."

Wood is required to give answers that are "as complete and straightforward as the information available to the responding party allows." Code Civ. Proc. § 2033.220. The response is evasive, in that Wood was asked to admit that he did not provide any of the writings requested, and Wood states in response that he did not provide any "additional documents". He must provide a straightforward answer to the request.

In response to RFA no. 6, Wood objected that the documents speaks for itself, and the request is vague and ambiguous as to the term "completely refuse". Without waiving the objections, Wood unequivocally denied the request.

The "document speaks for itself" objection is nonsensical in the context of this request. And the term "completely refuse" is not vague and ambiguous. Wood must provide a response without these objections.

Wood is also asked to admit that, in response to Switzer's 9/30/11 written request to inspect and copy records of Flournoy Management, Wood refused to allow the access (RFA no. 8), and Wood had no justification to completely refuse the access (RFA no. 9).

Wood's response to RFA no. 8 is the same as the response to the similar RFA no. 5. The motion should be granted for the same reasons.

Wood's response to RFA no. 9 is the same as the response to RFA no. 6. The motion should be granted for the same reasons.

The form interrogatory response contained a number of general objections not directed to any particular interrogatory. These objections are overruled. None of them have any apparent merit. If a timely motion to compel has been filed, the burden is on the responding party to justify any objection or failure fully to answer the interrogatories. *Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-221; *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255. Having filed no opposition, and submitted nothing in support of any of these objections, defendant has not met that burden. Moreover, a motion to compel lies where objections are "too general." Code Civ. Proc. § 2030.300(a)(3); see *Korea Data Systems Co. Ltd. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516 [objecting party subject to sanctions for "boilerplate" objections]. These "general objections" are just that – too general and boilerplate. Further, general objections violate Code Civ. Proc. § 2030.210(a)(3), which requires that each objection be stated separately and bear the same number or letter as the interrogatory to which it is directed. Thus, one may not object to the entire set.

Form interrogatory no. 15.1 asks for information about each denial of material allegation and each special or affirmative defense in the pleadings. Wood's response that he requires additional time to complete this interrogatory and will supplement his response, is clearly unresponsive. Wood must provide the information requested.

Form interrogatory no. 17.1 requires information about each request for admission that was not an unqualified admission. Wood's response to RFA no. 4 was not an unqualified admission, but no information was provided in response to interrogatory 17.1.

Contrary to Switzer's assertion, though a couple of objections were asserted, the response to RFA no. 7 was an unqualified admission. Thus, no further 17.1 response is required.

RFA no. 10 asked Wood to admit that he never paid a $5,000 initial capital contribution as a member of Flournoy Management. Wood unequivocally denied the request. In the form interrogatory 17.1(b) response, Wood stated that he provided the initial investment in-kind, as provided for by the operating agreement. The response is inadequate, as the interrogatory requests all facts supporting the denial. A complete response would identify what exactly was contributed in-kind, the value of what was contributed, and when the contribution was made. In response to subpart (d), requiring identification of all documents that support the response, Wood identified two documents, apparently by Bates number, Flournoy 2332 and Flournoy 465. Switzer takes issue with this response, pointing out that 2332 is a list of surgical parts with no prices, and 465 is a FedEx

receipt showing a shipment of unidentified material to Dixie Switzer. While these documents wouldn't seem to provide much support for Wood's assertion, the court will not compel any further response to subpart (d). If that's all the documentary evidence Wood has, that's what he's going to be limited to.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/30/2012.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Switzer v. Flournoy Management, LLC, et al.***, Superior Court Case No. 11CECG04395

Hearing Date: **October 31, 2012 (Dept. 402)**

Motion: Motions to Compel Further Responses to Form Interrogatories and Requests for Admissions

Tentative Ruling:

To appoint a discovery referee for all purposes. See Code Civ. Proc. § 639(a)(5). The parties will share the costs of the referee equally. See Code Civ. Proc. § 645.1 and Cal. Rules of Court, Rule 3.922(f). Each party will submit up to three nominees to the Court within 5 days of notice of the ruling. The Court shall appoint the referee from the nominees against whom there is no legal objection. See Code Civ. Proc. § 639(a). The parties shall meet and confer and jointly prepare a proposed order appointing the referee.

Explanation:

Based on the excessively contentious and overly aggressive manner in which this action has been litigated to date, it is apparent that this action will require exceptionally time consuming judicial supervision in all respects, including discovery. The two discovery motions on calendar for 10/31/12 are the first to be set in this action. Four more discovery motions are set for 2/5/13. The papers submitted in connection with this motion make clear that many more time consuming discovery motions are likely to be filed, and that counsel cannot resolve even straightforward matters, even as simple as provision of a verification, without court intervention.

Thus, this action meets the criteria set forth in *Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 105, and a discovery referee will be appointed *sua sponte* pursuant to Code Civ. Proc. § 639(a)(5). The appointment will be for all discovery purposes.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/30/2012.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Butler v. Robertson***
Superior Court Case No.: 12CECG01354

Hearing Date: October 31, 2012 (**Dept. 503**)

Motion: By Defendant Gerald Dale Robertson to compel Plaintiff Vivian Kay Butler's initial responses to form interrogatories (set one), special interrogatories (set one), requests for production of documents (set one), and for monetary sanctions

Tentative Ruling:

To grant, with Plaintiff's verified responses to the discovery, without objection, due within 10 days after service of this minute order, and to grant Defendant's request for monetary sanctions against Plaintiff in the amount of $450.00, payable to Defendant's attorney within 30 days after service of this minute order.

Explanation:

Failure to serve a timely response results in a waiver of all objections to the interrogatories and the requests for production of documents. (Code Civ. Proc., §§2030.290, 2031.300, 2023.010, 2023.030.) Unless the one subject to the sanction acted with substantial justification or other circumstances make the imposition of the sanction unjust, sanctions are mandatory. (Code Civ. Proc., § 2030.290; 2031.300.)

Here, there's no indication that Plaintiff Vivian Kay Butler ("Plaintiff") has served any verified, written responses to the discovery. At most, it appears that Plaintiff has simply provided Defendant Gerald Dale Robertson ("Defendant") with 12 documents in an attempt at informal discovery. While this is certainly laudable, Defendant is entitled to sworn, written responses to the discovery he has propounded on Plaintiff. (Code Civ. Proc., §§2030.210, 2030.250; 2031.210; 2031.250.)

Second, while it was equally laudable, as a matter of courtesy, for Defendant's counsel to write to Plaintiff concerning her failure to respond, such an effort was not required because the moving party on a motion to compel where there has been no response is not required to show a "reasonable and good faith attempt" to resolve the matter informally with the opposing party before the filing the motion. (Code Civ. Proc., §2030.290; 2031.300; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411.)

Third, the 13 deposition subpoenas served by Defendant are irrelevant to the issue of whether or not the Plaintiff failed to respond to discovery propounded on her. Deposition subpoenas are directed at those not a party to the action, in this case, to obtain documents. (Code Civ. Proc., §§2020.010(a)(1); 2025.280(b); *Terry v. SLICO* (2009) 175 Cal.App.4th 352, 357.) By contrast, requests for production of documents seek documents and other tangible evidence from parties to the action and as already mentioned, the written response is required to be signed under oath. (Code Civ. Proc., §2031.020 et seq.)

Fourth, if Plaintiff deemed Defendant's responses to her discovery requests deficient, her remedy was to timely move for a further response. (Code Civ. Proc., §§ 2030.300; 2031.300.)

Finally, as mentioned above, statute provides that the court "shall" impose a monetary sanction against the losing party or attorney on a motion to compel unless the one subject to the sanction acted with substantial justification or other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., §§2030.290, 2031.300.) Here, as a matter of law, Plaintiff did not act with substantial justification or any justification, for that matter, in failing to respond, and the court finds no other circumstances that would make the imposition of the sanction unjust.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/30/2012.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Kalanjian v. Walgreen Co.***
Case No. 12CECG00904

Hearing Date: October 31st, 2012 (Dept. 503)

Motion: Application of Michael Mullen to Appear as Counsel Pro Hac Vice

Tentative Ruling:

To grant the application of Michael Mullen to appear as counsel pro hac vice, provided that he pays the $500 filing fee for the application to the Fresno County Clerk's Office. (Cal. Govt. Code § 70617(e)(1).)

Explanation:

Defendant has complied with all of the requirements of CRC 9.40. The application contains the residence and office address of the applicant, the courts to which he is admitted to practice and dates of admission, that he is in good standing in those courts, that he is not currently suspended or disbarred in any court, the titles of the courts and causes in which he has filed an application to appear pro hac vice in this state in the past two years, the dates of the applications, and whether they were granted, and the name, address and telephone number of the member of the state bar who is attorney of record. (See decl. of Michael McMullen and decl. of James Emerson.)

Defense counsel also states that he has sent a check for $50 to the State Bar to pay for the application, as well as sending a copy of the application to the Bar. (Emerson decl., ¶ 3.) However, there is no indication that defendant has paid the $500 filing fee for the application to the Fresno County Superior Court clerk's office. (Govt. Code § 70617(e)(1).) Therefore, the court will require the applicant to pay the filing fee before the order granting the application will be entered.

Previously, the court denied the application for failure to show proof of service of the application on the State Bar. CRC 9.40(c)(1) requires a proof of service by mail under CCP § 1013a of a copy of the application and notice of hearing on all parties who have appeared in the case and the State Bar. Defendant has now provided a proof of service showing mailing on the plaintiffs' counsel and the State Bar. (See proof of service for pro hac vice application.) Therefore, defendant has complied with CRC 9.40, and the court intends to grant the application for pro hac vice admission, provided that the applicant pays the $500 filing fee to the court clerk.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/30/2012.
(Judge's initials) (Date)

03 **Tentative Ruling**

Re: ***Rizo v. Concrete by SMC***
Case No. 10CECG04318

Hearing Date: October 31st, 2012 (Dept. 501)

Motion: Plaintiffs' Application for Default Judgment

Tentative Ruling:

To deny the application for default judgment, without prejudice.

Explanation:

First of all, it appears that Castillo may have filed bankruptcy, in which case the court cannot grant a default judgment against him because all actions against him will have been stayed. (See court's minute order from settlement conference of September 14, 2012.) Plaintiffs' counsel will need to provide a declaration as to the status of the possible bankruptcy proceedings, and whether or not a stay is in effect.

Assuming no stay is in effect, in event that defendant is indeed in default, plaintiffs have failed to prove up the amount of damages they seek. Plaintiffs seek penalties under Labor Code § 203, plus liquidated damages under Labor Code § 1994.2. Section 1194.2 provides,

"In any action under Section 98, 1193.6, or 1194 to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission or by statute, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation." (Lab. Code, § 1194.2.)

Also, section 203 provides, "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." (Lab. Code, § 203.)

Here, plaintiffs seek substantial penalties of $10,000 or more per plaintiff, but they offer no information about the number of days worked, or the hourly wage on which the penalties are based. Also, the liquidated damages are based on an 8 hour minimum wage, but it is unclear how many hours each plaintiff worked. The attached spreadsheet is not particularly helpful. Therefore, plaintiffs' counsel must provide a better declaration regarding the calculation of wages and penalties.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 10/30/2012.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Eaton v. PV Holding Corp***
Superior Court Case No. 10CECG04237

Hearing Date: October 31, 2012 (Department 502)

Motions: by plaintiffs to compel further response to Form Interrogatories, Set No. One, from defendant AMN Healthcare Allied, Inc.

By plaintiffs to compel further responses and production of documents responsive to Demand for Inspection, Set No. One, from defendant AMN Healthcare Allied, Inc.

Tentative Ruling:

Plaintiffs have impermissibly combined two motions into one, and are ordered to file separate motions for each discovery device in the future. The fee for the second motion shall be paid by November 7, 2012. The parties are also ordered to read and remember Fresno County Superior Court Rule 1.1.10.B which forbids filings more than two inches thick, and California Rules of Court, Rule 3.1110(f) which requires tabs between exhibits.

The motion regarding the form interrogatories is taken off calendar as moot per the reply papers statement that the further response received since the motion was filed is adequate.

On the motion to compel further responses and production of all documents responsive to plaintiffs' Demand for Inspection, Set No. One, the motion is denied as to Demands Nos. 33 and 34 for failure to show good cause. The motion is granted as to No. 37, ordering further responses without objections, and production of all responsive documents, but with all information identifying patients (if any) redacted.

The motion is granted as to all others, all objections are overruled but for those on the basis of the attorney/client privilege and/or work production doctrine, ***if*** the document is identified in the further response to the Demand to which it applies by stating "its author, date of preparation, all recipients, and the specific privilege claimed." *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 291, fnt 6. The further responses must comply fully with Code of Civil Procedure sections 2031.210 – 2031.250, and all responsive documents not identified and listed in the response as privileged must be produced. The further responses and documents are to be served via overnight delivery on or before November 14, 2012.

Sanctions are denied for failure to comply with Code of Civil Procedure section 2023.040.

Explanation:

The pleadings and filings of counsel show good cause for the discovery sought in each demand for inspection but for Numbers 34 and 35, which refers to a person who is not mentioned anywhere else.

No evidence is provided to support claims that there are responsive documents constituting work product or attorney/client communications. Such evidence is required to be included within the response to the demand for which the allegedly privileged document is responsive, as Code of Civil Procedure section 2031.250 requires that the responding party specifically identify each document for which a privilege is claimed and the privilege asserted. The form of identification to be provided in this instance is that described above. Absent such proof, a document may not be withheld on the basis of an unproven objection.

Defendant argues that its position will prevail in this case, and therefor discovery is improper. There are but a few ways that a Court may make such a finding – demurrer, motion for summary judgment, or trial. An opposition to a discovery motion is not one of them. "The fact that a triable issue has not yet been determined cannot bar the disclosure of information sought for the very purpose of trying that issue." *Hauk v. Superior Court of Los Angeles County* (1964) 61 Cal. 2d 295, 299. Defendants are entitled to their opinion of the merit of their position, but the law's requirement can be found in Ronald Reagan's farewell address: "trust, but verify."

The demands for inspection here seek documents relevant to AMN's own contentions, and those about the policies and procedures of AMN with regard to rental vehicles used by its employees both before and after the accident, as well as documents pertaining to the assignment of Ms. Boaz at the time of that incident. Such materials easily meet the test of relevancy. "[F]or discovery purposes, information is relevant to the 'subject matter' of an action if the information might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement." *Jessen v. Hartford Casualty Ins. Co.* (5th Dist. 2003) 111 Cal. App. 4th 698, 711-712.

AMN contends that searching for and production of the requested materials is burdensome and harassing. To show objectionable burden requires a declaration from the responding party specifying the tasks required to be completed to answer, and the number of hours required to do those tasks. Generalization does not suffice. "Many hundreds of man-hours" and "approximately nine months" "is conclusionary and not factual in character," and insufficient to show burden. *Coriell v. Superior Court* (1974) 39 Cal. App. 3d 487, 493. See also *Perkins v. Superior Court* (1981) 118 Cal. App. 3d 761, 764. As AMN did not offer such a declaration, the objections for burden and harassment fail.

The trade secret (or "contractual privacy) objections made by AMN suffer from the same fate, as AMN failed to provide a declaration with admissible evidence of each of the required factors to assess such an objection. *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 208,[1] *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal. App. 3d 1327, 1345.

For several demands, AMN has objected that the demand is too vague to answer, but has also failed to specify what term or phrase causes it a problem Without any statement as to what is ambiguous, or why the demand is vague, such an objection is a "nuisance" objection, and does not justify a complete failure to produce. *Standon Co., Inc. v. Superior Court* (1990) 225 Cal. App. 3d 898, 901.

"Whether the description of records is sufficient to inform [responding party] of that which is desired, presents a question merely of whether under the circumstances and

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[1] This case was cited by the California Supreme Court on the trade secret issue in 2004. See *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal. 4th 1029, 1039.

situation generally, considered in the light of reason and common sense, he ought to recognize and be able to distinguish the particular thing that is required." *Pacific Automobile Ins. Co. v. Superior Court* (1969) 273 Cal. App. 2d 61, 68. A review of the demands shows that they are understandable when viewed in the context of the parties' allegations in this case.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/29/2012.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Emigidio Tirado Martinez v. Farmers Insurance Group***
Court Case No. 12CECG02239

Hearing Date:**October 31, 2012 (Dept. 501)**

Motion: Motion to Strike Portions of Plaintiff's Complaint

Tentative Ruling:

As Mr. Martinez is in pro per and likely has no knowledge of the local rule 2.2.6 or California Rules of Court 3.1308, the court posts this tentative but nonetheless orders each party to be present for hearing. No further leniency during the pendency of this action should be expected by Mr. Martinez due to his pro per status.

To grant the motion and to strike the entire complaint. However, leave to amend is granted. If Plaintiff amends the complaint, he should either submit his complaint in proper pleading format, or (if he chooses to use Judicial Council forms) he must use the correct Judicial Council form for the Complaint and not use the form for the Answer. He is expressly given leave to add the insured as a defendant. He may maintain the insurance company as a defendant only if he can properly plead the legal prerequisites to maintaining a direct action against the insurer.

Plaintiff is granted 20 days' leave to file the first amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order.

Explanation:

The "facts" stated in this "complaint" are insufficient to state a cause of action against *anyone* based on the two statements made in the pleading filed. The first statement ("That the party is at fault, but, that I'm entitle 75% of claim" [*sic*]) is arguably a conclusion of law and not a factual allegation at all. The second statement ("They, the insurance alleges I'm not entitle [*sic*] to 100%, not considering loss and damages") appears to be plaintiff's allegation as to the determination made by the defendant insurer. But even if this second statement is considered a factual allegation, it is certainly insufficient to state any cause of action. Thus, even assuming that defendant was plaintiff's insurer (on this motion defendant argues this is not the case, but even assuming, *arguendo*, that it was the insurer) these facts are insufficient to state a cause of action.

However, it appears evident from the exhibits to the "complaint" that defendant is not plaintiff's insurer, but instead one Jose Leyva was the insured. In that event, the law is also clear that plaintiff, as a third party, will not be able to state a cause of action against the insurer directly unless and until plaintiff secures a judgment against the insured. [Insurance Code §11580(b)(2); *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287; *Chamberlin v. City of Los Angeles* (1949) 92 Cal.App.2d 330, 332]

The motion to strike must be granted, since the pleading is obviously defective. However, leave to amend is granted. At this point, given the lack of any real allegations, it is entirely too speculative to conclude that plaintiff cannot state a cause of action against the insurer.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 10/30/2012.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Elena Martinez v. Uncle Tom's Liquor, et al.***
Court Case No. 12CECG02194

Hearing Date:**October 31, 2012 (Dept. 503)**

Motion: Defendants' Demurrer to the Complaint

Tentative Ruling:

To overrule the demurrer.

Explanation:

The mere fact that plaintiffs state that the minor to whom the alcohol was sold was "visibly" intoxicated instead of "obviously" intoxicated (i.e., the complaint does not use the exact words of the statute) does not subject the complaint to demurrer. *Obviously*, the phrase "visibly intoxicated" encompasses the concept of being "obviously intoxicated." On demurrer, the allegations of the complaint must be construed liberally by drawing reasonable inferences from the facts pleaded. [*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517] This is more than a reasonable inference.

And clearly, the requirement of alleging damage/injury to plaintiff has been expressly alleged in this cause of action, since it alleges that as a result of defendants' conduct plaintiff Elena Martinez "was involved in a fatal motor vehicle accident, causing her serious personal injuries as alleged herein." The fact that it is not in the same sentence as the one alleging that the minor to whom alcohol was sold was "visibly intoxicated" does not mean that the cause of action does not allege injury. The cause of action is adequately stated.

As for the arguments concerning punitive damages, this is a remedy, not a cause of action, and thus cannot be reached by demurrer. A demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief requested. [*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561-1562; *Grieves v. Sup.Ct. (Fox)* (1984) 157 Cal.App.3d 159, 164-165; *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 Cal.App.4th 365, 385] If defendants are uncertain as to "who" plaintiffs are alleging did "what" on the exemplary damages attachment, any such uncertainties can be cleared up through discovery. [See *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616]

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/30/2012.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Pelley v. St. Agnes Medical Center***
Superior Court Case No. 11CECG01704

Hearing Date: October 31, 2012 (Dept. 503)

Motion: St. Agnes Medical Center's Motion to Compel Responses to Discovery

Tentative Ruling:

To grant the Motion to Compel Responses to Form Interrogatories, Set One, Special Interrogatories, Set One, Requests for Production, Set One, Requests for Production, Set Two, and Request for Statement of Damages. Plaintiffs Michael Pelley, Douglas Pelley, Jacob Pelley, and Myde Ann Pelley by and through her guardian ad litem Teri Jackson will provide verified responses to the Form Interrogatories, Set One; Special Interrogatories, Set One, Requests for Production, Set One, Requests for Production, Set Two, and Statement of Damages served by St. Agnes Medical Center without objection within 15 days after service of this order. Plaintiffs and their counsel, David M. Moeck, shall pay the law firm of McCormick Barstow Sheppard Wayte & Carruth LLP the sum of $580.50 in sanctions within 30 days of service of this order.

To order St. Agnes to pay additional filing fees of $240.00 to be due and payable to the court clerk within 30 days of service of this order. (Gov. Code § 70617, subd. (a).) Compelling responses to five forms of discovery constitutes five motions.

Explanation:

Form & Special Interrogatories & Request for Production of Documents

Form Interrogatories, Set One, Special Interrogatories, Set One, and Request for Production of Documents, Set One were served on all plaintiffs by mail June 7, 2012. (Beltramo Decl. ¶¶ 4-6; Exhibits B, C, D.) On June 11, 2012, Requests for Production of Documents, Set Two were served by mail on all plaintiffs. (Beltramo Decl. ¶ 7; Exhibit E.) No responses have been received. (Beltramo Decl. ¶ 9.)

The motion to compel the initial responses to the form interrogatories and special interrogatories and the motion to compel the production of documents are granted. (Code Civ. Proc. §§2030.260, subd. (a), 2030.290, subd. (b), §2031.300, subd. (b).)

Statement of Damages

When a complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the defendant may request a statement setting forth the nature and amount of the damages being sought. (Code Civ. Proc. § 425.11, subd. (b).) The request shall be served on the plaintiff, who shall serve a responsive statement as to damages within 15 days. In the event that a response is not served, the party, on notice to the plaintiff, may petition the court in which the action is pending to order the plaintiff to serve a responsive statement. (Code Civ. Proc. § 425.11, subd. (b).)

The request for statement of damages was served by mail June 11, 2012. (Beltramo Decl. ¶ 3; Exhibit A.) No responses have been received. (Beltramo Decl. ¶ 9.)

The motion to compel is granted.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/30/2012.
(Judge's initials) (Date)

(5) **Tentative Ruling**

Re: ***Cuadro v. Kell***
Superior Court Case No. 12CECG00531

Hearing Date: October 31, 2012 **(Dept. 403)**

Motion: Compel Further Responses to Form Interrogatories, Special Interrogatories and Inspection Demands Sets One

Tentative Ruling:

To order the parties to "meet and confer in good faith". To continue the hearing to November 20, 2012 at 3:30 p.m. in Dept. 403 for this purpose. The parties will file a joint statement on or before November 12, 2012 regarding the responses that are still at issue. The joint statement will set forth the disputed interrogatory or document request, the original answer, the position of the Plaintiff and moving party, followed by the position of the Defendant and responding party. The parties must meet and confer in order to prepare and file this joint statement. Service on the other party is to be via fax or hand delivery. No other papers shall be filed. The issue of sanctions will be taken under submission.

Plaintiff shall pay an additional filing fee of $120.00, due and payable to the court clerk within 5 days of service of the minute order by the clerk. (Gov. Code § 70617, subd. (a).)

Explanation:

The moving party's declaration must show a "**reasonable** and good faith attempt" to resolve the issues informally with opposing counsel. [CCP §§ 2016.040, 2030.300(b); see *Clement v. Alegre* (2009) 177 CA4th 1277, 1294—reasonable and good faith attempt at informal resolution entails something more than bickering with opposing counsel]

Factors considered: Various factors may be considered by the court in determining whether a party made a "reasonable" and "good faith" attempt to resolve the issue informally, including:

• *Size of case, complexity of discovery:* Greater effort at informal resolution may be required in larger, more complex cases;

• *Previous relations with opposing counsel:* The history of the litigation and the nature of the interaction between counsel;

• *Present dispute:* The nature of the issues, and the type and scope of discovery requested;

• *Timing:* The time available before the motion filing deadline, and the extent to which the responding party was complicit in the lapse of available time;

• *Prospects for success:* Whether, from the perspective of a reasonable person in the position of the discovering party, additional effort appeared likely to bear fruit;

• *Evidence of discovery abuse?* When discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a

reasonable inference can be drawn of an intent to harass and improperly burden. [*Obregon v. Sup.Ct. (Cimm's, Inc.)* (1998) 67 CA4th 424, 431]

Here, it appears that Plaintiff has not been acting in good faith to attempt an informal resolution.

For example, plaintiff's lack of a "good faith" effort at informal resolution was shown by the following:

—plaintiff propounded grossly overbroad interrogatories (suggesting improper motives);

—Upon receiving defendant's objections, plaintiff sent a single brief letter, *late in the relevant time period,* requesting informal resolution;

__Defendant objected, but appears to have answered most of the interrogatories;

___Plaintiff filed the instant motion during the time he was supposedly unavailable for any purpose;and

—Plaintiff's motion to compel made no effort to explain why interrogatories of such breadth were proper. [*Obregon v. Sup.Ct. (Cimm's, Inc.)*, supra, 67 CA4th at 432–433.

In the case at bench, the case involves an automobile accident. Notably, the Defendant states that she was not injured in the crash. Therefore, it appears noncomplex. It appears that there have been some previous discovery issues in the case. As for the scope of the present dispute, the Plaintiff appears overly concerned about a boilerplate objection **preface** despite the fact that it appears that almost all of the Form Interrogatories were answered in full. As for the Special Interrogatories, although many of the responses contained a boilerplate objection, it appears that a complete response followed. As for the Inspection Demands, they were extremely broad. Accordingly, some of the objections appear to have merit. See Exhibits 5-7 consisting of the Defendant's responses to Form Interrogatories, Special Interrogatories and "Production Requests" attached to the Declaration of Haron.

Ultimately, it appears that much of the dispute could be resolved via further "meet and confer" efforts. Therefore, the Court will order the parties to "meet and confer" in good faith. See *Obregon v. Sup.Ct. (Cimm's, Inc.)* (1998) 67 CA4th 424.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCKapetan on 10/30/2012.
(Judge's initials) (Date)